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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

MAR 15 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In The Matter of

IMPROVING COMMISSION PROCESSES

PP Docket No. 96-17

COMMENTS OF THE DOCKET FILE COPY ORIGINAL
TELECOMMUNICATIONS RESELLERS ASSOCIATION

The Telecommunications Resellers Association ("TRA"), through undersigned counsel, hereby submits its Comments in response to the Notice of Inquiry, FCC 96-50, released by the Commission in the captioned docket on February 14, 1996 (the "Notice"). In the Notice, the Commission offers for public comment a wide variety of proposals for (i) improving the speed and quality of the services it provides to the public, (ii) reducing regulatory burdens on the telecommunications industry, including the elimination of outdated and/or unnecessary regulations, and (iii) making more efficient and productive use of its increasingly limited resources. The Notice further invites the public to offer suggestions as to how, and to propose other means by which, the Commission could further streamline or otherwise improve its procedures, processes, rules and regulations.

I.

INTRODUCTION

Virtually all of TRA's 450-plus resale carrier members and their underlying service and product suppliers not only are subject to Commission regulation, but remain, in critical

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respects, reliant upon and beholden to the Commission's resale and other pro-competitive policies.¹ Indeed, TRA freely acknowledges that the emergence, growth and development of a vibrant telecommunications resale industry is a direct product of a series of pro-competitive initiatives undertaken, and pro-competitive policies adopted and enforced, by the Commission over the past decade.² As TRA's resale carrier members expand their selection of products and services from their existent base of interstate/intrastate interexchange and international telecommunications services to encompass local exchange, wireless, internet and other diverse telecommunications offerings, the critical importance to these resale providers of the

¹ TRA was created, and carries a continuing mandate, to foster and promote the interests of entities engaged in the resale of telecommunications services. Employing the transmission, and often the switching, capabilities of underlying facilities-based network providers, the resale carriers comprising TRA create "virtual networks" to serve generally small and mid-sized commercial, as well as residential, customers, providing such entities and individuals with access to rates otherwise available only to much larger users. TRA resale carrier member also offer small and mid-sized commercial customers enhanced, value-added products and services, including a variety of sophisticated billing options, as well as personalized customer support functions, that are generally not made available to low-volume users.

While TRA's resale carrier members range from emerging, high-growth companies to well-established, publicly traded corporations, the bulk of TRA's resale carrier members are not yet a decade old. Nonetheless, TRA's resale carrier members collectively generate annual revenues in the billions of dollars. The emergence and dramatic growth of TRA's resale carrier members over the past five to ten years have produced thousands of new jobs and new commercial opportunities. In addition, TRA's resale carrier members have facilitated the growth and development of second- and third-tier facilities-based interexchange carriers by providing an extended, indirect marketing arm for their services, thereby further promoting economic growth and development. And perhaps most critically, by providing cost-effective, high quality telecommunications services to the small business community, TRA's resale carrier members have helped other small and mid-sized companies expand their businesses and generate new employment opportunities.

² While it firmly believes that market forces are, all things being equal, generally superior to regulation in promoting the efficient provision of diverse and affordable telecommunications products and services, TRA is cognizant of the important role played by the Commission in fostering and protecting competitive markets, particularly where market forces are inadequate to discipline the behavior of all market participants.

Commission's ongoing efforts to promote and expand both competition and competitive opportunities and to safeguard against anticompetitive conduct has and will continue to become even more manifest.

Certainly, TRA salutes the Commission for its recent efforts to enhance the quality and speed with which it delivers services, while at the same time endeavoring to increase efficiency and to reduce unnecessary regulatory burdens. TRA further applauds the Commission's receptivity to, and indeed, its willingness to call for, proposals for further reforms from the industries it regulates and the public it serves. The Commission has thus far been remarkably successful in eliminating "backlogs," streamlining its rules and processes and removing outmoded and/or unnecessary regulations.

Remarkable is far too mild a term to describe certain elements of the Commission's "new and improved" regulatory approach. For example, the Common Carrier Bureau deserves a substantial amount of the credit for the smooth transition from a single to multiple toll free service areas codes, preventing through its aggressive intervention premature "800" number exhaustion and speeding the availability of "888" toll free numbers. And TRA believes that the Common Carrier Bureau's enlightened and expanding reliance on negotiated rulemakings should produce more efficient and effective regulatory schemes.³

Continuing these efforts, the Common Carrier Bureau has proposed a number of ways to render it, its processes and its products more accessible. For example, the Common Carrier Bureau has proposed to establish a public information office that would serve as the

³ TRA also believes that the International Bureau should be commended for dramatically speeding the processing of Section 214 and other applications, reducing, and commencing efforts to further reduce, regulatory burdens, and opening its processes.

Bureau's "front door," making readily available to the public not only assistance, but such valuable materials as industry analysis reports, news releases and common carrier orders. Such a readily accessible source of help and information would be particularly welcomed by smaller industry participants, including the not insignificant percentage of TRA's resale carrier members who cannot afford Washington, D.C. offices or representation. Entities with limited resources would also benefit from the Common Carrier Bureau's expanded use of public forums and industry meetings. Forums and meetings of this sort provide not only effective, but affordable, participatory vehicles for small and mid-sized companies.

The Common Carrier Bureau has also called upon the industry and the public to propose ideas that would assist it in implementing any number of planned improvements, including (i) faster and more efficient public distribution of information, (ii) more time-sensitive and efficient conduct of statutorily-mandated and other rulemaking proceedings, (iii) more efficient cataloguing of public submissions, (iv) more streamlined forms, (v) more efficient and responsive interaction by telephone with the public, and (vi) more efficient and effective processing of complaints. It is the manner in which formal complaints are processed and resolved that TRA will address herein.

TRA will recommend below that the Common Carrier Bureau establish a discrete, streamlined, highly-expedited complaint process for airing and resolving carrier-to-carrier disputes brought by resale carriers against their underlying network providers. TRA submits that such an accelerated process would not only greatly enhance the efficacy of the complaint process for smaller carriers, but would provide for more effective, and far more efficient, use of limited industry and Commission resources.

II.

ARGUMENT

A. The Commission's Formal Complaint Process Is Currently Too Cumbersome To Resolve Carrier-To-Carrier Disputes Brought By Resale Carriers Against Their Underlying Network Providers

The Commission's formal complaint processes suffer from the same problems that plague virtually all adjudicatory mechanisms -- *i.e.*, they are cumbersome and costly and as a result, favor those entities which are possessed of greater resources and which coincidentally stand to benefit from maintenance of the status quo. Because complaint resolution often takes years and can require substantial investments in legal and other services, the process tends to work to the advantage of those parties who are not only able to spend considerable amounts on lawyers and experts, but who are able to act unilaterally to disadvantage others. Put differently, a party in a position to deny something of value, or to act in a manner injurious, to another party and to defer through legal maneuvering regulatory intervention addressing such conduct will benefit from a cumbersome and costly complaint process while the party so denied or injured will suffer.

In disputes between resale carriers and their underlying network providers, the network provider is invariably better positioned to take advantage of and to derive benefit from a costly, cumbersome dispute resolution process. Major facilities-based carriers certainly have far more extensive financial and legal resources to dedicate to the complaint process than their much smaller resale carrier customers. And the facilities-based carrier, as the provider of services, is obviously the party in the position to either deny service to, or to provide service in

such a way as to injure, the resale carrier and to benefit from any delay in resolution of the resale carrier's complaint seeking relief from such actions.

By way of example, if a network provider were to discriminate against a resale carrier by denying it access to preferred price points or superior service capabilities, it is the resale carrier that would be disadvantaged competitively during any extended consideration of a complaint addressing such denial, while the network provider, having determined that it was in its interest to discriminate against the resale carrier, would benefit from such delay. Likewise, if a network provider were intentionally slowing the provisioning of service orders submitted by a resale carrier or abusing the resale carrier's proprietary network information, the network provider would continue to benefit from its conscious actions during any delay in resolving complaints targeting such activities, while the harm to the resale carrier would continue to mount. Indeed, if the delay in obtaining relief were extensive enough, the resale carrier could be driven into bankruptcy or forced to settle on unattractive terms to preserve its business, leaving the network provider as the undeserving victor.

As is apparent, problems inherent in a complaint process modeled as a traditional adjudicatory vehicle are exacerbated by the multiple, conflicting relationships between resale carriers and their underlying network providers. Resale carriers are large, often very large and sometimes the largest, customers of their network providers. Resale carriers are also, however, direct -- and often the most effective -- competitors of these same entities. A complaint process geared to one or another of these relationships is not necessarily suited to deal with both. For example, delayed resolution of a complaint filed by a traditional customer alleging that it was the object of discrimination would not be fatal because the customer could ultimately be made

whole through the award of monetary damages based on the difference between what the customer had paid for service and what it would have paid in the absence of discrimination. Such a delay in a resale carrier/network provider dispute, on the other hand, could be devastating to the resale carrier because it would be denied the tools necessary to remain competitively viable during the period of delay; monetary damages never fully account for lost business opportunities or for destruction of a business.

Further compounding the problems arising from delayed resolution of resale carrier complaints against network providers is the speed and frequency of change in the telecommunications industry. The value of price points and service offerings diminishes rapidly with the passage of time following their initial availability. The market is constantly evolving and moving in new and different directions. What is useful and attractive today may well be of little value tomorrow. Hence, a determination made two years after the fact that a resale carrier was wrongfully denied a price point or service offering will provide little more than a pyrrhic victory for the resale carrier. There is a strong likelihood that no such delayed directive from the Commission would ever be implemented because the price point or service offering that was the subject of the complaint would be useless to the resale carrier at that time.

Moreover, it is important to bear in mind that the harm occasioned by a cumbersome process for resolving complaints lodged by resale carriers against their underlying network providers is not borne exclusively by the resale carriers. During the lag in time between the filing and ultimate resolution of a resale carrier's complaint, the consuming public is denied the full benefits of the resale carrier's services. If, for example, the resale carrier were complaining that it was being denied preferred price points or superior service offerings, it

obviously cannot share with current and prospective customers the benefits of those prices and services while its complaint remains pending. Similarly, if the gravamen of a resale carrier's complaint were that its network provider was intentionally diminishing the quality of the services the resale carrier could provide, the resale carrier's customers would be the ultimate victims of those wrongful actions and would continue to be so harmed until such time as the resale carrier were granted the relief it sought.

It is important to stress here that the concerns expressed by TRA above are not theoretical. Resale carriers have filed dozens of formal complaints with the Commission against their network providers seeking redress therein for a host of wrongs. The overwhelming majority of those complaints are either still pending or have been settled on terms unfavorable to resale carrier complainants who simply could no longer afford to prosecute their complaints in the face of the seemingly endless delays. A case in point is a complaint brought in June 1993 by Public Services Enterprises of Pennsylvania, Inc. ("PSE") against AT&T Corp. ("AT&T") alleging that AT&T had wrongfully denied PSE access to Virtual Telecommunications Network Services Option 24. Although PSE ultimately prevailed, the decision granting its complaint did not issue until May 1995.⁴ And even then, the Commission merely directed the parties to "engage in good faith negotiations aimed at resolving any remaining issues pertaining to PSE's request for service and any damages liability," noting that "PSE will, of course, have the opportunity to file a supplemental complaint to pursue any available remedies should the parties negotiations prove

⁴ Public Services Enterprises of Pennsylvania, Inc. v. AT&T Corp., File No. E-93-091, FCC 95-169 (released May 5, 1995).

unsuccessful."⁵ It is now nearly three years later and neither PSE nor its customers have received the benefit of rates and services to which PSE was lawfully entitled.

In outlining the problems with the Commission's formal complaint process as it relates to resale carrier complaints against their underlying network providers, TRA is not engaging in a "who-struck-John exercise." The Enforcement Division works diligently to process the large number of formal and informal complaints filed year in and year out with the Commission. The Enforcement Division is clearly hampered by budgetary and personnel restraints. More critically, it is saddled with a cumbersome process which not only leaves the door open to extended delays, but consumes far too many Commission resources. As TRA will discuss below, there is a better way.

B. The Commission Should Adopt A Separate, Streamlined, Highly-Expedited Process For Resolving Carrier-To-Carrier Disputes Brought By Resale Carriers Against Their Underlying Network Providers

To address the unique adjudicatory problems posed by the dual nature of the relationship between resale carriers and their underlying network providers, TRA urges the Commission to establish a discrete, streamlined, highly-expedited process for resolving carrier-to-carrier disputes brought by resale carriers against their underlying network providers. This process would be ancillary to, and utilized in lieu of, the Commission's traditional formal complaint processes. In Appendix I attached hereto, TRA has proposed a basic format and "timeline" for such a "resale carrier track" which establishes a series of rapid-fire deadlines designed to facilitate prompt and efficient dispute resolution. While there is no magic to the

⁵ Id. at ¶ 30.

schedule suggested by TRA, several elements of the process are critical if the "resale carrier track" is to achieve its intended purpose. TRA will briefly address these features below.

Perhaps most critically, disputes brought by resale carriers against their underlying network providers must be completed within a confined period of time. TRA believes that 90 days would be adequate to air and resolve all matters at issue; certainly no more than 120 days should be allowed. The key is to provide for quick resolution of disputes so that competition is not dampened and the consuming public is not deprived of superior rates and services because of adjudicatory delays.

Second, the process should not be voluntary and the results thereof should be binding. The sole differences between the "resale carrier track" and the Commission's traditional formal complaint processes should be the speed with which disputes are resolved, as well as the procedural adjustments necessary to facilitate such expedited action. The mandatory nature of the Commission's traditional formal complaint process and the decisional force of the decisions emanating therefrom should be transplanted in their entirety to the "resale carrier track." If the expedited processes were voluntary or the results thereof less than binding, the purpose of establishing the alternate vehicle would be defeated. Network providers would not voluntarily acquiesce to expedited consideration of resale carrier complaints and anything less than a completely binding decision would eliminate the prompt certainty the "resale carrier track" is designed to achieve.

Third, "resale carrier track" complaints should be heard by an administrative law judge or other like hearing officer who has been afforded substantial discretion in the manner in which the complaint proceeding would be conducted. Certain procedural safeguards should be

mandatory, but beyond this threshold, the hearing officer should be empowered to determine the best way to move the case forward. Thus, parties should have the right to engage in discovery, including document production and depositions, but beyond a certain guaranteed amount, the hearing officer should be authorized to set appropriate time and volume limits. The parties should also have the right to subpoena and cross-examine the other party's witnesses, but the hearing officer should be empowered to establish limits on the number of witnesses and the time of examination.

The scope of the proceedings conducted under the "resale carrier track" should not be limited other than by the threshold requirement that the dispute involve a resale carrier and its underlying network provider and be directly related to that relationship. The hearing officer should be permitted to award equitable relief, including orders enjoining conduct or requiring specific performance, as well as monetary damages. In particularly complex cases, it might be advisable to provide for bifurcated consideration of liability and damage claims, with the latter consideration perhaps extending beyond the normal 90 or 120 day deadline. The Commission may even wish to consider mechanisms to prompt settlement of damages issues following the determination of liability, such as directing the hearing officer to select among the parties' respective "last best offers."

Subject to confidentiality requirements, the transcripts and records of the "resale carrier track" complaint proceedings, as well as the hearing officer's interim rulings and ultimate decision therein, should be made available for public inspection. While findings made in a one complaint proceeding should not necessarily be determinative of the outcome of another complaint proceeding, public disclosure of transcripts and decisions should serve to reduce the

number of complaints as appropriate standards of conduct become known and are widely followed. Thus, if both a network provider and its many resale carrier customers are aware that a practice has been held unlawful in a complaint proceeding, it is likely that that practice will be curtailed. Similarly, an adverse decision in a complaint proceeding brought by one resale carrier will likely discourage another resale carrier from pursuing the same action.

There are obviously any number of details that would have to be addressed in implementing a "resale carrier track" formal complaint process. A negotiated rulemaking may well be the best vehicle for doing so. The central elements, however, are relatively straightforward. Thematically, the keys are speed, efficiency and certainty. If these three elements can be achieved, the Commission's formal complaint process should provide a viable forum for resolution of resale carrier/underlying network provider disputes.

III.

CONCLUSION

By reason of the foregoing, the Telecommunications Resellers Association urges the Commission to establish a separate, streamlined, highly-expedited process for addressing and resolving formal complaints brought by resale carriers against their underlying network providers, as outlined by TRA herein.

Respectfully submitted,

**TELECOMMUNICATIONS
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March 15, 1996

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APPENDIX I

Proposed Timeline for 'Resale Carrier Track' Complaint Process

Day 1:

File complaint and request for relief, including memorandum of fact and law.

Day 15:

File answer, including memorandum of fact and law.

Day 20:

Initial conference with Hearing Officer.

Day 25:

Deadline for exchange of document production requests.

Day 40:

Deadline for production of documents.

Day 45

Deadline for exchange of deposition notices.

Day 60:

Deadline for deposition completion.

Day 70

Deadline for exchange of written direct testimony and exhibits.

Day 80:

Hearing

Day 90:

Decision